91 N. E. 761; *Sanders* v. *Baggerly*, 96 Ark. 117, 131 S. W. 49. *Contra, Landrith* v. *Hudgins*, 121 Tenn. 556, 120 S. W. 783. The principal case is one of the latter class. The complaint clearly alleged a repudiation by the Missouri Synod of certain essential doctrines of the Iowa Synod with which the defendants had become affiliated. Since this fact was admitted by the demurrer it seems that there was no theological question for the court to decide, and that the demurrer was improperly sustained.

TAXATION — STATE INCOME TAX — VALIDITY OF STATUTE. — An Oklahoma statute provides for an income tax on residents, and imposes a like tax on incomes earned by nonresidents on property or businesses within the state. A resident of Chicago, who had large oil holdings in Oklahoma, asks for a temporary injunction restraining the collection of the tax. *Held*, that the tax is valid. *Shaffer* v. *Howard*, 250 Fed. 873 (District Court, E. D. Oklahoma).

For a discussion of this case, see NOTES, page 168.

TRUSTS — POWERS AND OBLIGATIONS OF TRUSTEES — MANDATORY PROVISIONS AS TO INVESTMENTS. — The settlor of a trust directed the trustees to invest in railway bonds bearing at least 4 % interest. A loss was occasioned by investments in 4½ % New York City Bonds and 3½ % Liberty Bonds of the first issue. *Held*, trustees liable for loss occasioned by investments in 4½ % New York City Bonds, but not for the loss occasioned by the investment in Liberty Bonds. *In re Loudon's Estate*, 171 N. Y. Supp. 981 (Surrogate Ct.).

As a general principle trustees are bound to do whatever the creator of a trust directs them to do, unless the beneficiaries, being *sui juris*, excuse them from so doing. *Denike* v. *Harris*, 84 N. Y. 89; *Womack* v. *Austin*, 1 S. C. 421; *Handley's Estate*, 253 Pa. St. 119, 97 Atl. 1040; *Robinson* v. *Robinson*, 11 Beav. 371. But where it is impossible to carry out directions, or where the interests of the beneficiaries absolutely require a change, mandatory provisions may be disregarded. *McIntire* v. *Zanesville*, 17 Ohio St. 352. See *Citizens National Bank* v. *Jefferson*, 88 Ky. 651, 11 S. W. 767. That there was nothing in the principal case to justify a disregard of mandatory provisions is shown by the court in holding the trustees liable for the investment in 4½ % New York City Bonds. It is conceivable that a situation may arise where investments in war bonds would be made by a prudent man to protect his other property, in which case it is submitted, a like investment by trustees in disregard of directions, would be justified. But again no such crisis presented itself in the principal case. In not holding the trustees liable for the loss occasioned by the investment in 3½ % Liberty Bonds, the court sanctioned a patriotic motive of the trustees, at the expense of the beneficiary and without his consent.

UNFAIR COMPETITION — BY MEANS UNLAWFUL AS AGAINST THIRD PERSONS — UNNECESSARY IMITATION OF WARES HAVING SECONDARY MEANING — BURDEN OF PROOF. — The defendant was selling Shredded Wheat Biscuits that were exact imitations of the plaintiff's product. The biscuits had acquired a secondary meaning, in that the consumer considered them to be produced by a single maker, to whose manufacture was ascribed part of the value. Since, in several places, the biscuits were sold unpacked with no distinguishing marks, it was claimed the public was being misled. But a change in the form, size, or color of the products was impracticable. It was doubtful whether some letter or symbol could be impressed on the biscuit or whether a band or tag could be attached which would designate the manufacturer without involving too great expense. *Held*, that the defendant be enjoined, but if in six months he shows that all possible distinguishing marks are impracticable, the injunction should be dissolved. *Shredded Wheat Co.* v. *Humphrey Cornell Co.*, 250 Fed. 960 (C. C. A.).

The cases on the doctrine of secondary meaning seem to divide themselves into two classes, depending on whether or not the imitated features are functional, *i. e.*, essential to the commercial success of the article. When the distinctive characteristics are non-functional, the defendant's conduct is palpably unfair, and marked changes are ordered. *Yale and Towne Mfg. Co.* v. *Alder*, 154 Fed. 37, 83 C. C. A. 149; *Hiram Walker* v. *Grubman*, 222 Fed. 478. Even the appearance of the defendant's name is insufficient, unless it is clear no confusion will result. *Fox* v. *Glynn*, 191 Mass. 344, 78 N. E. 89; *Enterprise Mfg. Co.* v. *Landers*, 131 Fed. 240, 65 C. C. A. 587. But when all the elements are functional, usually no relief is given. *Globe-Wernicke Co.* v. *Fred Macey Co.*, 119 Fed. 696, 56 C. C. A. 304; *Marvel Co.* v. *Pearl*, 133 Fed. 160, 66 C. C. A. 226; *Daniel* v. *Electric Hose and Rubber Co.*, 231 Fed. 827; *Edward Felker Mop Co.* v. *U. S. Mop Co.*, 191 Fed. 613, 112 C. C. A. 176; *Diamond Match Co.* v. *Saginaw Match Co.*, 142 Fed. 727, 74 C. C. A. 59. However, a clearly inexpensive noticeable alteration is ordered. *Flagg Mfg. Co.* v. *Holway*, 178 Mass. 85, 59 N. E. 667; *Edison Mfg. Co.* v. *Gladstone*, 58 Atl. 391 (N. J.). In the principal case, all the characteristics are apparently functional, and it would seem that in alleging unfair competition the plaintiff should have had the burden of showing a commercially practicable means of distinguishing the products. The better analysis, however, sanctioned by the result in the principal case, is that the defendant is interfering with the plaintiff's interest in a valuable good will, and the justification that the injury is due to fair competition is an affirmative defense to be proven by the defendant who sets it up.

VENDOR AND PURCHASER — IMPLIED WARRANTY IN SALE OF CATTLE — NEGLIGENCE — DUTY TO DISCLOSE CONTAGIOUS DISEASE. — Defendant sold a calf to the plaintiff, who, although not a veterinary, was known to be skilled in diagnosing and treating diseases of cattle. Defendant knew the calf had ring-worm, a contagious disease common in the locality, but did not disclose the fact. Plaintiff did not buy the calf until he had had it on trial, and he knew the calf was not sound, although he was unaware of the nature of its ailment. The disease was communicated to other cattle belonging to plaintiff and to himself and his son. By statute it was forbidden to sell animals afflicted with contagious diseases. (ANIMAL CONTAGIOUS DISEASES ACT, REV. ST. CAN., 1906, c. 75, §§ 35–38.) *Held*, that there was no implied warranty, and that the statute gave plaintiff no right of action. *O'Mealey* v. *Swartz*, [1918] 3 WEST. WKLY. REP. 98 (Saskatchewan).

The holding that there was no implied warranty seems justified, since the vendee apparently relied on his own judgment. *Hight* v. *Bacon*, 126 Mass. 10; *Waeber* v. *Talbot*, 167 N. Y. 48, 60 N. E. 288. See *Kellogg Bridge Co.* v. *Hamilton*, 110 U. S. 108, 116, and 25 HARV. L. REV. 75. On the question of negligence, however, the court's conclusions cannot be accepted. A vendor, by the reasonable view, should use due care not to sell without warning articles which are likely to cause harm. *Blood Balm Co.* v. *Cooper*, 83 Ga. 856, 10 S. E. 118; *MacPherson* v. *Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050. See Brett, M. R., in *Heaven* v. *Pender*, 11 Q. B. D. 503, 509. The English courts seem unwilling to hold a vendor liable for negligence in the sale of animals. *Ward* v. *Hobbs*, 4 App. Cas. 13. However, see *contra*, *Skim* v. *Reutter*, 135 Mich. 57, 97 N. W. 152; *Grimes* v. *Eddy*, 126 Mo. 168, 28 S. W. 756. In the principal case the court seems horrified at the thought that the general principle of negligence would hold one liable for spreading a disease through his person. Such liability has been imposed in at least one case. *Missouri, Kansas & Texas Ry.* v. *Wood*, 68 S. W. 802 (Tex.). It should be for the trier of fact to determine under the circumstances of the particular case whether non-disclosure amounted to negligence. But no judge or jury should be permitted to find it due care to violate a statute designed to prevent the very injuries for which